

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1108 of 1995

in

SPECIAL CIVIL APPLICATION No 3255 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and
MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed: Yes
to see the judgements?
 2. To be referred to the Reporter or not? : Yes
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

LABSHANKAR GIRJASHANKAR DAVE

Versus

STATE OF GUJARAT

Appearance:

MR DD VYAS for Appellants
GOVERNMENT PLEADER for Respondent No. 1

CORAM : MR.JUSTICE C.K.THAKKER and
MR.JUSTICE A.L.DAVE

Date of decision: 10/05/1999

ORAL JUDGEMENT

This appeal is filed against the dismissal of SCA
No. 3255 of 1992 on September 28, 1995. On that day the
Learned Single Judge passed the following order:-

"Having heard the learned Counsel for the parties
I do not find any illegality in the order dated

14th July, 1981 which calls for interference of this Court sitting under Article 226 of the Constitution of India. Hence the petition is dismissed. Rule discharged."

2. The case of the appellant was that he joined services of the erstwhile Western India State Agency Secretariate at Rajkot in 1955. On formation of the State of Saurashtra in 1947, he was absorbed as Senior Assistant and was confirmed on the said post on January 15, 1949. He was allocated to the State of Gujarat with effect from May 1, 1960. He was put in a district cadre. In 1976, however, he was brought back to the Secretariate. The next promotional post was that of Section Officer, Under Secretary and then to the Dy. Secretary. It was contended by the appellant that his case was required to be considered for the promotional post of Under Secretary as well as Dy. Secretary and though his juniors came to be promoted, his case was not considered and injustice was meted out to him. He, therefore filed Special Civil Application No. 351 of 1977, but the petition was summarily dismissed by the learned Single Judge. The matter was taken before the Division Bench by filing LPA No. 243 of 1997, which was allowed by the Division Bench and the following direction was issued by the Division Bench:

"A writ of mandamus will issue directing the Government of Gujarat to treat the petitioner as having been exempted from passing the departmental examination for promotion to the post of Section Officer and other higher posts. The Government of Gujarat is further directed to treat the petitioner as having been promoted to the post of Section Officer and still higher posts from the date when the immediate Junior to the petitioner in the cadre of Senior Assistants was promoted to the higher post and all benefits with regard to pay, allowances and other consequential benefits must be given to the petitioner with effect from that date. The State Government must consider whether the petitioner would have been promoted to cadres higher than the cadre of Section Officers, namely, Under Secretary and Deputy Secretary, on merits because it is not possible for us to say whether the petitioner was entitled to be promoted from the post of Section Officer to the higher post of Under Secretary and Deputy Secretary or whatever higher post there may be. The Government is directed to take appropriate action within six

months from the receipt of the writ and it is further directed to intimate to the High Court the decision taken in pursuance of these directions. The decision must be communicated within six months from the date of receipt of the writ by the Government. The respondent will pay the costs of this Letter Patent Appeal and the Special Civil Application to the petitioner."

3. In spite of the judgement and order passed by the Division Bench in the said LPA, the case of the appellant was not considered. He, therefore, filed the present petition i.e. Special Civil Application No.355 of 1982. Rule was issued, the respondents appeared and an affidavit in reply was filed. In the counter affidavit, it was stated that after the judgement of the Division Bench, the case of the petitioner for further promotion was considered by the Government in accordance with law and an order dated 14.7.81 Annexure B to the petition was passed. In the order, it was observed that the case of the petitioner was required to be considered for departmental promotion. Accordingly his case was placed before the Departmental Promotion Committee for considering his suitability or otherwise as Under Secretary and then as Dy. Secretary. It transpired to the Committee that it was very difficult prima facie to come to a decision solely on the basis of notional service. It was observed that since the petitioner had not worked as Section Officer his case could not be considered for promotion to the post of Under Secretary as well as Dy. Secretary. No final decision was thus taken in case of the appellant-petitioner and it was held that claim of the petitioner for further promotion from the post of Section Officer was liable to be rejected.

4. As stated above, the Learned Single Judge was of the view that there was no illegality in the order passed by the Government which called for interference and accordingly the petition was dismissed. The said order is challenged in the Letters Patents Appeal.

5. Several contentions have been raised by Mr. Vyas, Senior Advocate of M/s. Vyas and Vyas Associates. It was contended that once an order was passed by the Division Bench and direction was issued to consider the case of the appellant-petitioner on the basis of notional service, it was incumbent on the State Government to consider the case of the petitioner - appellant and it was not open to ignore the said direction on the ground that the petitioner had not worked on the post of Section Officer and hence his case would not be considered for

further promotion as Under Secretary and Dy. Secretary. Mr. Vyas submitted that the order passed by the Division Bench had become final as it was not challenged by the State by approaching the Honourable Supreme Court. Even otherwise, according to the Learned Counsel, the question of consideration of notional service would arise only when a person has not actually worked. If a person has actually worked, his case is required to be considered on the basis of his performance. But where a person is unable to work on a particular post and a Court issues a direction to consider his case on notional basis, that his case must be considered as if he had worked. By not doing so, an illegality is committed by the respondents. The Learned Single Judge, by dismissing the petition, by a cryptic order, has committed an error of law and the order deserves to be quashed and set aside.

6. The Ld. AGP supported the orders passed by the Authorities. He submitted that if the appellant had not worked as Section Officer, it cannot be said that by not considering him for promotion to Under Secretary and Dy. Secretary on the basis of his performance as Section Officer, an illegality is committed and the order passed by the Learned Single Judge is legal and valid.

7. Having heard the Learned Counsel for the parties, we are of the opinion that the Letters Patent Appeal deserves to be partly allowed. In our opinion, the submission of the Learned Counsel for the appellant is well founded that the point was concluded by a decision of the Division Bench in previous LPA. The Division Bench in that case, directed the State Government to consider the case of the appellant on notional basis as Section Officer, Under Secretary and Dy. Secretary. It was, therefore, incumbent on the authorities to consider the case of the appellant as per that direction.

8. Almost in similar circumstances, a case came up for consideration before the Apex Court in State of Mysore Vs. Saiyed Mehmood; AIR 1968 SC 1113. In that case, the petitioner filed a petition for a writ of mandamus directing the State Government to give him promotion from the post of Jr. Statistical Assistant to Sr. Statistical Assistant. Under the relevant Recruitment Rules, such promotion was to be given on the basis of seniority cum merits. The High Court of Mysore issued a writ of mandamus directing the State Government to give promotion to the petitioner. Being aggrieved by the said direction, the State of Mysore approached the Supreme Court.

9. Setting aside the direction issued by the High Court and allowing the appeal, the Supreme Court observed that when a promotion was to be given on the basis of seniority cum merits, it was not open to the High Court to issue direction to give the promotion. A writ of mandamus can be issued directing the State Government to consider the case of the petitioner on the basis of relevant statutory rules. The Supreme Court directed the State Government to consider the case of the petitioner on the basis of seniority cum merits.

The Supreme Court, therefore, issued the following directions:-

"In the result, we allow the appeals and set aside the orders passed by the High Court. We direct the State Government to consider whether Syed Mahmood and Bhao Rao should have been promoted to the posts of senior statistical assistants on the relevant dates when officers junior to them were promoted, and if so, what consequential monetary benefits should be allowed to them. While granting special leave, this Court directed that the appellants shall pay the costs of the respondents in any event."

10. The principle laid down by the Apex Court in Syed Mahmood applies on the case on hand. In our judgement, the State Government has committed an illegality in not considering the case of the appellant for further promotion from the post of Section Officer to the post of Under Secretary and Deputy Secretary on the ground that the appellant had not worked. The said order deserves to be interfered with. In similar circumstances in Syed Mahmood, the Supreme Court directed the State of Mysore to consider the case of the petitioner regarding his fitness for promotion at the relevant time i.e. in 1959. The Supreme Court observed:-

"The State Government would upon such consideration be under a duty to promote them as from 1959 if they were then fit to discharge the duties of the higher post and if it fails to perform its duty, the court may direct it to promote them as from 1959."

11. In the instant case also, the case of the appellant for promotional post of Under Secretary and Deputy Secretary required to be considered as and when the appellant became due as if the State would be

considering the case at the relevant time and on that basis, will pass appropriate order as to whether the appellant was fit to be promoted as Under Secretary and Deputy Secretary, and if yes, to what extent, he would be entitled to monetary benefits.

12. For the foregoing reasons, the appeal deserves to be allowed partly. The State Government is directed to consider the case of the appellant on notional basis for the promotional post of Under Secretary and Deputy Secretary in accordance with rules in force and to pass appropriate consequential orders. Since the matter pertains to remote past and the appellant died during the pendency of the proceedings, the State Government will undertake this exercise within three months from the receipt of writ of this Court. Direct Service permitted.

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